United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1401

To Be Argued By
DENIS A. SCINTA, Esq.
Estimated Time for Argument
(10 Minutes)

B
P/S

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Respondent,

T-7930

vs.

WILLIAM ROCHE,

Defendant - Appellant

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FILED
NOV 3 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PRELIMINARY STATEMENT

On August 29, 1977, WILLIAM ROCHE, age 22, was condemned to prison for six (6) years upon his plea of guilty to a violation of Title 18 U.S.C. 2113(b). by the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York.

The Court, in its sentencing of Mr. Roche to prison, erred respecting the applicability of the Federal Youth Corrections Act to this instant matter.

STATEMENT OF FACTS

On February 18, 1977, the Manufacturer's and Traders Trust Company in East Aurora, New York, was robbed.

Subsequent and on March 17, 1977, the defendant, WILLIAM ROCHE, was arraigned pursuant to Indictment No. CR-77-42 charging him with violations of Title 18 U.S.C. 2113(a) and (b).

Preliminary matters were completed before the Magistrate and a trial was scheduled for August 9, 1977.

On August 5, 1977, Mr. Roche plead guilty to Count II (18 U.S.C. 2113(b)) of the Indictment in complete satisfaction of all the charges pending against him. The Court ordered a presentence report and scheduled sentencing for August 29, 1977.

A pre-sentence report was submitted to the Court together with numerous letters written to the Court on behalf of Mr. Roche.

Counsel for the defendant did, at the time the plea was entered, request that the Court consider the Federal Youth Corrections Act in conjunction with the Federal Young Adult Offender provisions of the law.

Again, at the time of Mr. Roche's sentencing, his attorney requested the Court consider these provisions (T-2,3,4), and pointed out to the Court why he felt that the factors stated in the Young Adult Offender provisions had been satisfied and, thus, could permit the Court to sentence Mr. Roche under the Federal Youth Corrections Act. (T 5-20).

The Court did not sentence Mr. Roche under the Federal Youth Correction Act because it felt that Mr. Roche had individuals behind him who would be supportive of his rehabilitation. (T. 25-27)

After Counsel for Mr. Roche requested the Court to clarify its position on a F.Y.C.A. sentencing, the Court reiterated its reasoning in not applying the provisions of F.YC.A. in this case. (T. 31)

CONVICTION AND SENTENCE

Based upon the foregoing, Mr. Roche was sentenced as an adult to a prison term of six (6) years. Mr. Roche is presently incarcerated. This appeal is from that judgment of conviction.

POINT I

THE COURT ERRED IN NOT APPLYING THE HOLDING OF U.S. v. SCHWARTZ (500 F.2d 1350) UPON ITS SENTENCING OF THE DEFENDANT IN THIS MATTER.

The defendant, in this matter, was twenty-two years old at the time of his entry of the plea herein.

Thus, before the Court could sentence him, pursuant to the Federal Youth Corrections Act, it must satisfy itself that the defendant would not benefit from treatment provided under the Act. (18 U.S.C. 4216).

The Court, in deciding whether a particular person would benefit under F.Y.C.A., should consider certain factors such as previous criminal involvement of the defendant, his social background, capabilities, and his mental and physical health as set forth in the Youth Adult Offenders Act. (18 U.S.C. A. 4216).

The Court, after apparently considering these factors, decided not to apply the F.Y.C.A. It is submitted that the Court erred, however, when it made the decision.

United States v. Schwartz 500 F.2d. 1350 (1974) concerned the application of the F.Y.C.A. through the Young Adult Offenders Act 18 U.S.C. 4216 (formerly 18 U.S.C. 4209).

In that case, the defendant, a woman age twenty-five (25), plead guilty to one count of a drug-related indictment. She

had no previous record. The District Court, upon sentencing the defendant, made much of the fact that she came from a privileged background rather than from "the ghetto." She was characterized as not the "usual dumb kid." She was "far above the average so she knew what she was doing."

On appeal, the Second Circuit remanded the case for re-sentencing before another judge.

The Court of Appeals reasoned:

> "The (district) Court's statements, considered as a whole, were inappropriate because they are susceptible of the meaning that only a specific class of persons can claim consideration under the provisions of the (Youth Offender's) Act." (500 F.2d 1350 at p. 1352).

The reasoning which the Court of Appeals found inappropriate is the same reasoning that Judge Elfvin used when sentencing the defendant. The Court speaking stated:

> "So on that basis, I see no place for the application of the Youthful Offender's Act which was designed to provide for treatment and tutelage, treatment and supervision, the statute says of someone who has proceeded on the wrong path <u>by way of a wrong upbringing</u>, by virtue of <u>warped philosophy</u>, or by virtue of <u>wrong companions</u>. . ." (Transcript at 27, emphasis added).

The Court also held against Mr. Roche his educational background.

> "But look at yourself in the mirror, you are intelligent, the tests show you are very intelligent, you have not dropped out of high school, you got your diploma . . ." (Transcript at 28, emphasis added).

This reasoning has been held improper by the Second Circuit when it stated:

> "Understandably, the appellant has been left with the impression . . .that her intelligence and priveleged background were counted against her as pejorative factors disentitling her to treatment under the Youth Corrections Acts." (Schwartz, at 1351).

The Appellant further directs the Court's attention to footnote 1 of Schwartz at p. 1351 and its discussion of Judge Travia's reasoning when sentence was passed. It is respectfully submitted that a reading of the sentencing transcript wherein Judge Elfvin gives his reasons for not sentencing the defendant under the F.Y.C.A., (T.-27-28 and T.-31), is in the same vein as Judge Travia's reasoning. This manner of reasoning, the Court of Appeals, held was improper in Schwartz, infra.

Accordingly, it is submitted that the reasoning of the Court in the instant matter also should be held improper by the Court of Appeals, and the case should be remanded for resentencing before a different judge. (U.S. v. Schwartz 500 F.2d 1350 at p. 1352).

POINT II

THE COURT ERRED BY APPLYING A "FIXED AND MECHANICAL APPROACH" WHEN IT SENTENCED THE DEFENDANT.

The United States Supreme Court has held that it is an error if a Court, when sentencing, employs a fixed and mechanical approach in impo ng sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis. Williams v. Oklahoma 358 U.S. 576 (1959) Williams v. New York 337 U.S. 241, 247-250 (1949).

The Second Circuit has held, where this situation exists, then it requires invalidation of the sentence imposed. U.S. v. Brown 470 F 2d 285, 288-289 (2d. Cir. 1972); U.S. v. Baker 487 F 2d 360, 362-364 (2d. Cir. 1974).

Judge Elfvin's sentence falls into the category of a fixed and mechanical approach to the sentencing of Mr. Roche.

As argued in Point I, this case is on point with Schwartz. In Schwartz , the Court of Appeals found that the sentencing judge had applied a fixed and mechanical approach in sentencing, i.e. the sentence was based on the crime and not the individual.

Judge Elfvin's decision in the instant matter, was based on the crime. In the transcript of sentencing at page 31, the Court stated:

> "I do have a basic feeling although obviously I give individual consideration in each case, but I do have a basic feeling

> in bank robbery cases that (the F.Y.C.A.) is not to be applied." (T-31).

In our criminal justice system, a fixed and mechanical approach to sentencing could well result in a given case in destroying a person's rehabilitation if such person is incarcerated based upon employment of such a standard.

The Court, after reviewing the probation report in this case (a copy of which will be requested to be subpoenaed by the Court on this appeal), stated:

> "I am not too worried about your rehabilitation." (T.-25-26).

The Court further, before condemning Mr. Roche to jail, placed a great faith upon the individuals who were standing behind Mr. Roche in this matter. (T.-26).

These statements, together with the Court's publicized reputation for "toughness" in bank robbery cases (See Appendix A), should indicate to this Court that a "fixed and mechanical" standard was employed by Judge Elfvin in sentencing Mr. Roche.

Accordingly, this matter should be remanded for resentencing before a different judge. (U.S. v. Schwartz 500 F.2d 1350 at p. 1352).

CONCLUSION

For the reasons heretofore made, the Appellant respectfully requests that the sentence imposed on the defendant-appellant be vacated and the case remanded for re-sentencing to another judge.

The defendant-appellant premises this request upon his contentions that the sentencing judge failed to properly apply the Schwartz case. Further, that the sentencing court applied a fixed and mechanical approach when it sentenced the defendant.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

KEVIN W. SPITLER, being duly sworn, deposes and says:

That deponent is not a party to the within action, is over the age of eighteen (18) years and resides at 60 Russell Avenue, Buffalo, New York.

That on October 20, 1977, your deponent did serve three copies of the Appellant's Brief on the U.S. District Attorney's Office at 25 Delaware Avenue, Buffalo, New York, by delivering true copies thereof personally to said Office.

Kevin W. Spitler

Sworn to before me this 20th
day of October, 1977.

Joanne E. Burns
Notary Public: Erie Co., N.Y.
My Commission Expires: 3/30.79

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E/E 8/28/77

Bait Money Waits, Cameras Peer—Area Bank Heists Dive

By TERENCE P. McELROY
Courier-Express Staff Reporter

An icy stare beneath a wide-brimmed hat, a cold steel gun butt protruding from a belt and a running automobile engine 100 feet away was a scene occurring in area banks in epidemic proportions until recently.

Bait money was being surrendered almost as fast as it could be marked, silent alarms and closed-circuit camera equipment were being activated with unprecedented frequency and the trauma being experienced by banking personnel made the job downright undesirable.

Best and Beach

But nearly as quickly as the problem began, it has subsided — at least for the moment.

Authorities credit a number of factors for the decline in Buffalo area bank robberies. But, to a man, they are hesitant to predict that the worst is behind us.

Bank robberies, which virtually were nonexistent in this area until a decade ago, reached their peak here in 1975. In that year, the Buffalo metropolitan area — Erie and Niagara Counties — recorded an astonishing 62 bank holdups.

It was a rare downtown branch that evaded a robber's visit, and some were hit more than once.

But, quickly, the law reacted — without much fanfare and the robberies dropped to 17 in 1976. And through the first two-thirds of this year, only nine bank holdups have been recorded in the metropolitan area.

The criminal justice system — frm the officer on the street to presiding judges — often the target of criticism, must be given the bulk of the credit.

After the disastrous number of robberies in 1975, the FBI, local police and bank security personnel began holding monthly seminars on ways to stem the tide. At the same time, sentencing judges seemed to get tougher on convicted bank robbers. And the results, to date, have been encouraging.

Off the Streets?

Perhaps the primary reason for the drastic reduction in bank heists, and certainly the simplest explanation, is that the majority of persons responsible for Buffalo area bank jobs now are behind bars, according to Jack Green, coordinator of the FBI's Bank Robbery Div. here.

Explains Green:

"There were a number of gangs, maybe five or six, and they're now off the streets."

He added that it is not uncommon for the same group to stage numerous bank heists.

Going hand in hand with the removal from the street of gangs responsible for what may amount to the majority of area bank holdups is the no-nonsense approach undertaken by judges.

Federal Judge John T. Elfvin, a former U.S. attorney here, is the judge most often cited for his tough approach to the problem.

'The Word'

In the last 18 months, he has given numerous 15 to 20-year prison terms to convicted bank robbers.

"I have tried to give some deterrence in my sentences," Judge Elfvin said in what only can be described as an understatement.

Green puts it another way:

"The word on the street is don't hit banks. You get hard time."

Another weapon that has successfully combated bank robberies is the cooperation authorities have received from the media, Green said.

He claimed that surveillance photos of bank robbery suspects appearing in newspapers and on television, and editorials calling for harsh treatment of convicted robbers, have been helpful in reversing the tide.

... Someday?

If Green and others are pleased with the results they have achieved in combating bank robberies, they are a long way from expressing confidence that final victory has been won.

"There are some real pros now in jail," Green said.

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